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No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

A. T. GORDON, ET AL., *Petitioners,*

v.

GRANVILLE H. LANCE, ET AL., *Respondents.*

On Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia

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Brief for the American Association of School Administrators and The Council of Chief State School Officers, Amici Curiae, Urging Affirmance

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INTEREST OF THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND THE COUNCIL OF CHIEF STATE SCHOOL OFFICERS

The American Association of School Administrators (AASA) is a voluntary, nation-wide organization of school administrators. Founded in 1865, AASA, has grown steadily until today its membership includes over 18,000 school administrators throughout the country. It is fair to say that a substantial majority of American children attend schools administered by AASA members.

The Council of Chief State School Officers (CCSSO) is an independent organization, founded in 1928, whose members comprise the chief state school officers in each

of the 50 states and the heads of education agencies in six territories.

AASA and CCSSO are dedicated to improving the quality, as well as the administration of our nation's elementary and secondary schools. The *sine qua non* to an improvement of our public schools is adequate funding. Among the more serious obstacles to the provision of adequate funding are the extraordinary majority provisions under attack in this case. These provisions require the affirmative vote of 60 percent or ⅔ or sometimes even higher percentages of voters to pass a school bond issue. The result is the annual loss of literally hundreds of millions of dollars which are badly needed by our public schools.[1]

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[1] Scott and Hamilton report that, "The evidence is conclusive on this point: the [extraordinary majority] requirement has a powerful negative effect on the outcome of local bond elections." Scott and Hamilton "Extraordinary Majority Voting Requirements v. Equal Representation: A Constitutional Challenge", 10 Public Affairs Report, No. 4 (Univ. of Calif., Institute of Governmental Studies, Berkeley, California, August 1969) p. 3. Scott and Hamilton continue:

> "We may draw several conclusions from the survey of bond election experience in California. First, the very high rates of simple majority approval suggest that the local councils and boards submitting the proposals have been remarkably in tune with their electorates. Second, it is the two-thirds requirement that is responsible for almost all of the defeats—and for the *appearance* of discord." [*id.* at 4. (emphasis in original)]

See also "Results and Trends in California School District Bond Elections: 1954-59" (California State Department of Education, Bureau of Educational Research, Sacramento, California, 1960), pp. 1-3; Starner, *General Obligation Bond Financing By Local Governments: A Survey Of State Controls* (Univ. of Calif., Bureau of Public Administration, Berkeley, California, 1961), pp. 76-83, 111-117; Marini, *Local Bond Elections in California: The Two-Thirds Majority Requirement* (Univ. of Calif., Institute of Governmental Studies, Berkeley, California, 1963), pp. 9, 30.

Since this Court's decisions striking down those provisions of state law which excluded non-freeholders from the franchise in bond elections,[2] it has become even more difficult to pass school bond issues. The previously excluded voters are, as a group, more likely to be apartment-dwellers and less likely to have children in the school system. For these reasons they are more likely to be "no" voters in a school bond election. While we recognize the sound principles on which these decisions are based, it would nevertheless be most unfortunate if this Court were to strike down provisions excluding a group which tends to be "no" voters, but at the same time permit the use of extraordinary majority provisions whose inevitable effect is to dilute "yes" votes.

Because we seek to preserve our public school system, because we believe that our public schools cannot be maintained unless they are improved and cannot be improved unless they are adequately funded, we urge this Court to rule, for the reasons presented below, that extraordinary majority provisions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Two streams of constitutional development provide the analytical framework for determining whether so-called extraordinary majority provisions violate the Equal Protection Clause. The first of these streams involves the development of equal protection theory generally and the evolution of the "compelling-interest" test as a standard of review for equal protection claims.

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[2] *Cipriano* v. *City of Houma*, 393 U.S. 701 (1969); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970).

This approach to the problem of extraordinary majority provisions requires the Court to ask whether the applicable standard of review is the compelling-interest test or the reasonable-basis test, and whether there is adequate legislative justification to meet the applicable test. The second stream of constitutional development against which extraordinary majority provisions may be measured involves more narrowly the voting rights cases, which include the reapportionment cases, the "fenced-out" cases, and others. Our brief analyzes the constitutionality of extraordinary majority provisions from both points of view.

In our first argument, we urge that the compelling-interest test is applicable, but that if the reasonable-basis test is applicable, the extraordinary majority provisions involved here do not meet even that test.

Extraordinary majority provisions violate even the reasonable-basis test, we argue, because the extraordinary majority requirement has no relationship whatever to the wisdom of the electoral decision. It is impossible to say in the abstract that it is wiser to decide "no" rather than "yes." Accordingly, there is no rational basis for weighing the outcome toward a "no" result. Even assuming that extraordinary majorities are required only with respect to issues of unusual importance, in any particular case a "no" decision may be the height of folly. Instead of insuring a wiser electoral decision, an extraordinary majority provision simply incorporates a principle of minority rule which is wholly antithetic to the democratic electoral process.

Moreover, the issues with respect to which extraordinary majorities are required in this case—the issuance

of local bonds and the increasing of local tax rates—are no more important than a host of other governmental decisions—including decisions not to issue bonds and not to raise tax rates.

Finally, the fact that a majority of the states find it unnecessary to require extraordinary majorities with respect to these issues strongly suggests that such provisions, where they exist, are certainly not required by a compelling state interest. Indeed, legal and market controls over the issuance of municipal bonds are readily available to insure a wise local determination as to their issuance *vel non*. These controls provide a far less restrictive alternative than tampering with the basic concept of majority rule in an election. When less drastic means are available, the constitution requires that they be chosen.

In our second argument, we consider the voting cases and whether the principles they contain require the Court to hold extraordinary majority provisions unconstitutional. In urging that they do, we give primary attention to the ways in which the defenders of extraordinary majority provisions seek to distinguish these cases. Among the principal attempts at distinction are: the argument that extraordinary majority provisions relate to the "election" of an issue rather than of a man to hold an office; the argument that such provisions provide for a reasonable representation of interests; the argument that a fairly chosen representative government has decreed that this is the way particular issues are to be decided; and the argument that extraordinary majority provisions regarding bond issues and tax rate elections are sanctioned, if only by analogy, by similar provisions required with respect to a variety of questions decided by federal and state legis-

latures. Each of these arguments, we believe, is repudiated by principles contained in the voting cases which we examine.

Finally, we also explore the special reasons why extraordinary majority provisions offend the electoral process by incorporating into governmental decision-making a principle of inaction, of preservation of the status quo, of resistance to change—and, in the final analysis, minority rule in the electoral process. For all of these reasons, we urge that the extraordinary majority provisions involved in this case should be invalidated.

ARGUMENT

I.

THE DILUTION OF "YES" VOTES EFFECTED BY THE EXTRAORDINARY MAJORITY PROVISIONS IN THIS CASE IS NOT SUPPORTED BY ANY COMPELLING GOVERNMENTAL INTEREST, AND INDEED LACKS EVEN A REASONABLE JUSTIFICATION.

A. The Compelling Interest Test Is the Applicable Standard of Review in Judging the Constitutionality of Extraordinary Majority Provisions.

In April, 1969, this Court elaborated the compelling interest test by which certain alleged violations of the Equal Protection Clause are reviewed. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). In certain kinds of cases, *Shapiro* held, the validity of a law would no longer be decided by reference to the more traditional standard of whether the law bore a reasonable relation to a legitimate governmental purpose.[8] Rather the

[8] The reasonable basis test has been described in a large number of cases. For example, in *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U.S. 580, 584 (1934), the Court stated, "A statutory discrimination will not be set aside as the denial of equal protection

challenged law would "be judged by the stricter standard of whether it promotes a *compelling* state interest."[4]

In *McDonald* v. *Board of Election Commissioners*, 394 U.S. 809 (1969), decided a week after *Shapiro*, the Court described the kinds of cases to which the compelling interest is applicable. Specifically included were cases involving the right to vote, such as the re-

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of the laws if any state of facts reasonably may be conceived to justify it." See also *Gulf, C. & F.S.R. Co.* v. *Ellis*, 165 U.S. 150, 155 (1897) ("[Classification] must always rest upon some difference which bears a reasonable and just relation to the action in respect to which the classification is proposed and can never be made arbitrarily and without any such basis"); *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964) ("Normally [the state's] judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious"). In *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 808, 809 (1969), the Court referred to "the more traditional standards" for evaluating "equal protection claims" as requiring the court to determine whether "a challenged statute" bears "some rational relationship to legitimate state end." Under this traditional test a statute "will be set aside if based on reasons totally unrelated to the pursuit of that goal."

[4] *Shapiro* v. *Thompson*, *supra*, 394 U.S. at 634 (emphasis in original). Earlier cases had adumbrated this higher standard of review. As early as 1944, the Court had ruled that certain legislative classifications such as race were "suspect" and therefore subject to a higher standard of justification when reviewed under the Equal Protection Clause. *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). See also *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). Since that time other cases have indicated that in certain circumstances a higher standard of justification is likewise required. See *Bates* v. *Little Rock*, 361 U.S. 516, 524, (1960); *NAACP* v. *Button*, 371 U.S. 415 (1963). Finally, in *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968), the Court held that Ohio's impediments to third political parties would be constitutional only if justified by a "compelling" state interest.

apportionment cases.[5] As Mr. Justice Marshall has written:

> If it was not clear in 1965 [after the reapportionment cases], it is clear now that once a State has determined that a decision is to be made by popular vote, it may exclude persons from the franchise only upon a showing of a *compelling* interest.[6]

It is clear that the dilution of a vote is tantamount to a partial denial of the right to vote,[7] and that the same high standard of review is therefore applicable. Indeed, this Court has stated that statutes which "may *dilute* the effectiveness of some citizens' votes receive close scrutiny from this Court."[8] In such cases, "the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis'

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[5] 394 U.S. at 809, citing *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966). The Court concluded that it was not necessary to apply the compelling interest test in the *McDonald* case because "there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants ability to exercise the fundamental right to vote." (394 U.S. at 807).

[6] *Hall* v. *Beals*, 396 U.S. 45, 52 (1967) (dissenting opinion) (emphasis supplied). The majority opinion, based on grounds of mootness, did not disagree with Mr. Justice Marshall's assessment in the quoted passage.

[7] "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the exercise of the franchise." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964).

[8] *Kramer* v. *Union Free School District*, 395 U.S. 621, 626 (1969) (emphasis in original), citing *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

for the distinctions made are not applicable."[9] In a word therefore, the compelling interest test is applicable to dilution cases. Accordingly, there can be no doubt that the compelling interest test is applicable to distinctions made between "yes" voters and "no" voters in this case.[10]

It may be well at this point to dispose of petitioners *in limine* argument that there has been no dilution here, that indeed no distinction whatever has been made between "yes" and "no" votes. In the words of Judge Haymond's dissent in the Court below:

> Each voter in that election cast one vote and each vote so cast was counted as one vote for one voter [App. 59a].

This same argument could have been made in all of the reapportionment cases. It has been uniformly rejected. It is the effect that is determinative, not the formalistic fact that each person is permitted to place a single ballot in the ballot box. Where the effect is weighted voting, the result is condemned. The inquiry does not stop with whether, in a formal sense, one man is entitled to cast one vote.

In an extraordinary majority election, there is an obvious dilution of "yes" votes. In the case at bar, involving a 60% requirement, the voters are divided into classes of "yes" voters and "no" voters. A "yes" voter's vote is worth precisely two-thirds of

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[9] *Id.* at 627, 628.

[10] That this same high standard of review is applicable even though a bond election is involved is clear from *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969) and *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970), both of which applied the compelling interest test to bond elections, the first to revenue bonds and the second to general obligation bonds.

what a "no" voter's vote is worth. Petitioners' argue that there is no distinction or discrimination in this instance because the members of the class are not known ahead of time and a person who is in one class in this election may not be in the same class in the next election (Pet. Br. 9). This may or may not be a reason to justify the extraordinary majority provision, but it clearly does not alter the fact that a distinction exists between "yes" voters and "no" voters. They are in fact treated differently. The "yes" vote is plainly diluted. At a later time we shall examine whether the distinction is permissible under the Equal Protection Clause. Suffice it to say here, however, that the question cannot be avoided simply by saying that no distinction exists or that no dilution has occurred. Moreover, this Court has already held that, " 'fencing out' from the franchise a section of the population because of the way it *may* vote is constitutionally impermissible." [11] If a citizen may not be *excluded* from voting because of the way he *may* vote, surely his vote may not be *diluted* because of the way he *in fact* votes. If the Equal Protection Clause applies to the one, it must apply to the other.[12] As the Supreme Court of California has stated, "The Equal Protection Clause extends to the shared political interests of groups otherwise random and diverse." [13]

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[11] *Carrington* v. *Rash*, 380 U.S. 89, 94 (1965) (emphasis supplied).

[12] See *Williams* v. *Rhodes*, 393 U.S. 23 (1968), which, on the basis of the Equal Protection Clause, struck down Ohio's impediments to third political parties.

[13] *Westbrook* v. *Mihaley*, — Cal. 2d — (decided June 30, 1970), Slip Op. 23. Judge Sullivan's opinion is clearly the finest statement yet written on the constitutionality of extraordinary majority provisions.

A distinction having been drawn by giving a different effect to "yes" votes, than to "no" votes, we see no way of avoiding the application of the compelling interest test to determine whether the particular distinction is constitutionally permissible.

B. No Reasonable Basis, Let Alone a Compelling Governmental Interest, Can Be Found To Justify the Requirement of an Extraordinary Majority With Respect to the Issues Involved in This Case.

1. Extraordinary Majority Provisions Bear No Reasonable Relationship to the Wisdom of the Electoral Decision.

The principal reason advanced to justify the particular extraordinary majority provisions under review here is that the questions decided pursuant thereto are more important and more significant than other decisions of government. Whether or not this is true—and we contend and shall show below that it is not—,the threshhold issue is whether it makes a difference for equal protection purposes, even if such issues *are* more important. In other words, even assuming that the questions decided by extraordinary majorities here *are* more important than many other questions, does this alone justify requiring an extraordlinary majority for passage? We think not.

Simply that a decision is important does not *ipso facto* mean that it should be decided by an extraordinary majority. The other side of the coin in any extraordinary majority election is that the same important question of public policy may be decided by an electoral minority. Indeed, that is the crux of the objection to extraordinary majority provisions: not that there is rule by an extraordinary majority, but that there is rule by an electoral minority.

We have no doubt that whether municipal bonds are issued or whether taxes are raised are important ques-

tions. We do question that the decision to issue the bonds or to raise the taxes should be determined by a minority—for that is the inevitable effect of extraordinary majority provisions. In a word, extraordinary majority provisions subvert majority rule in an election. "The exercise of rights so vital to the maintenance of democratic institutions" [14] "cannot constitutionally be obliterated because of a fear of the political views" [15] held by a majority of the voters.

There is absolutely no relationship between the extraordinary majority device and the wisdom of an electoral decision, even assuming that the issue to be decided by the election is very important. No one can say in the abstract that it is wiser in a particular instance *not* to authorize, rather than to authorize, the issuance of bonds. Nor can one say in the abstract that it is wiser *not* to raise tax rates rather than to raise them. In any particular situation, it may be the height of folly not to act rather than to act. Yet the extraordinary majority provisions apply across the board, and the requirement must be met even though the bond issue in question represents the first and only long-term debt of the local jurisdiction.

There are devices by which to insure a wiser decision by the electorate—proper publicity, public hearings, access to channels of communications—,but the extraordinary majority provision is not one of them. Indeed, it is wholly unrelated to whether the electoral decision is wise. It would make as much sense to provide that whether a new school is to be built will be decided by the affirmative vote of only one-third or 10% of those voting.

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[14] *Schneider* v. *New Jersey*, 308 U.S. 147, 161 (1939).

[15] *Carrington* v. *Rash*, 380 U.S. 89, 94 (1965).

2. The Questions Required To Be Decided by Extraordinary Majority Provisions in This Case Are No More Important Than a Host of Other Governmental Decisions.

Turning now to the alleged reasons why the questions decided by extraordinary majorities here are more important than other governmental decisions, there are two reasons urged with respect to the issuance of bonds. The principal reason appears to be that the issuance of bonds "will bind all the people for long future periods." [16] The defenders of extraordinary majority provisions argue that "Unlike most legislative action, a decision to incur long-term bonded indebtedness is irreversible. Even if the bonds subsequently turn out to have been ill conceived, they cannot be amended and repealed." [17]

Our answer to this argument is that it proves too much: The same considerations are applicable not only to the incurring of long-term debt, but also too much other legislation. Decisions to lay down or not to lay down highways, to zone or not to zone for highrise apartments, to build or not to build schools—all mortgage the future in one direction or the other.[18] Like it

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[16] Brief of *amicus curiae*, California Taxpayers' Association in Support of Petitioners, p. 15.

[17] *Id.* at 3.

[18] Because a decision to incur bonded indebtedness or to raise taxes is no different from a myriad of other decisions which may be passed by a majority of the electorate or their representatives in the legislature, it may well be that requiring an extraordinary majority for these questions alone raises a serious independent infirmity under the Equal Protection Clause because of underinclusion. "Such underinclusiveness manifests a 'prima-facie violation of the equal protection requirement of reasonable classification.'" *Dandridge* v. *Williams*, 397 U.S. 471, 519 (1970) (Mr. Justice Marshall, dissenting). See also *Skinner* v. *Oklahoma*, 315 U.S. 535 (1942), and Tussman and tenBroek, "The Equal Protection of the Laws," 37 Cal. L. Rev. 341 (1949).

or not, the kind of society we and our children will be living in twenty years hence will depend on the decisions government and the electorate make in the meantime, not only with respect to bonded indebtedness, but with respect to a myriad of other issues as well. Certainly in this total equation the issuance of bonded indebtedness is not a substantial factor. Indeed, the very decision *not* to incur bonded indebtedness is doubtless of greater significance for the future—in terms of such matters as poorly educated children coming out of our public schools, and polluted waterways left by inadequate sewer systems—than the burden on future taxpayers were this indebtedness to be incurred. In short, a decision to incur bonded indebtedness is of no greater significance than an army of other decisions which government must make—including a decision not to issue the bonds. There is no special reason which justifies, let alone compels, treating a decision to incur bonded indebtedness differently from other governmental decisions.

The second reason advanced to justify extraordinary majority provisions with respect to the issuance of bonded indebtedness is that these provisions somehow encourage "sound fiscal policy" or "sound fiscal control." If this means anything other than the fact that the issuance of municipal bonds will bind future taxpayers (an argument we have already disposed of), it means that the improvident issuance of bonds can lead to financial catastrophe and the fiscal collapse of the issuing jurisdiction under the crushing burden of excessive debt. *How* an extraordinary majority provision or *what* extraordinary majority—60 percent, ⅔, 75 percent—is likely to prevent such improvidence is not clear.

What is clear, however, is that modern procedures for issuing municipal bonds—including the use of sophisticated consulting firms, specialized legal counsel, and careful issue-evaluation by respected national rating agencies—provide the real impediment to the profligate issuance of bonded indebtedness.[18a] Moreover, as the Supreme Court of California has noted:

> Bonds which might jeopardize a community's financial stability would be unlikely to find a purchaser. Municipal bonds are valued by investors not because of their speculative possibilities but because of their great security and the favorable federal tax treatment accorded them under 26 U.S.C.A. section 103. In addition, bond purchasers are unusually sophisticated; in 1964 over 60 percent of all bondholders were institutional investors such as commercial banks and insurance companies. (Investment Bankers Association of America, ***Fundamentals of Municipal Bonds*** (4th ed. 1965), p. 21).[19]

This Court has stated that distinctions under attack pursuant to the Equal Protection Clause may not be justified by dangers which are only "theoretically imaginable."[20] In truth, the danger of financial ruin which is said to require an extraordinary majority for the issuance of municipal bonds is, if not fanciful, only "theoretically imaginable" at best. That these fears and dangers are not matters of real substance is emphasized by the fact that most states find it unnecessary

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[18a] See Scott and Hamilton, "Extraordinary Majority Voting Requirements v. Equal Representation: A Constitutional Challenge," 10 Public Affairs Report No. 4 (Univ. of Calif., Institute of Governmental Studies, August 1969), p. 2.

[19] *Westbrook* v. *Mihaley*, — Cal. 2d — (decided June 30, 1970) Slip Op. 38, n. 44.

[20] *Williams* v. *Rhodes*, 393 U.S. 23, 33 (1968).

to condition the issuance of municipal bonds on approval by an extraordinary majority. Although most states do require some form of mandatory referendum as a condition precedent to incurring local bonded debt, the most common provision is for a simple majority.[21] Moreover, there is no evidence or suggestion that local jurisdictions in these states are on the brink of financial ruin.

Furthermore, any state that wishes to assure itself that no local jurisdiction will profligately incur bonded indebtedness may easily write into law requirements to assure that such indebtedness is incurred only when appropriate conditions are met. For example, state law may permit the issuance of local bonds only up to an amount computed pursuant to a properly balanced formula and only when appropriate provisions for repayment are made.[22] These are requirements that rationally relate to a wise decision. An extraordinary majority provision has no such relationship. When a less restrictive alternative is so readily available, it must be chosen.[23] This principle has already been ap-

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[21] Note, "Judicial Activism and Municipal Bonds," 56 Va. L. Rev. 295, 296, 331-334 (1970). A survey of state laws may be found in Starner, *General Obligation Bond Financing By Local Governments: A Survey of State Controls* (Univ. of Calif., Bureau of Public Administration, Berkeley, California, 1961), pp. 22-72, and Appendix A, p. 87.

[22] Starner, *loc. cit., supra,* n. 21, pp. 8-10; *Model Municipal General Obligation Bond Law* §§ 401-404, (National Municipal League, (1970).

[23] See *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960), ("Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can more narrowly be achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.")

plied in voter exclusion cases, *Carrington* v. *Rash*, 380 U.S. 89, 94-96 (1965); *Kramer* v. *Union Free School District*, 395 U.S. 621, 632-633 (1969).[24] Whatever objectives West Virginia seeks to accomplish by extraordinary majority provisions can be secured "by means more finely tailored to achieved the desired goal,"[25] and this fact only emphasizes the unconstitutionality of the approach West Virginia has chosen.

Finally, it should be noted that we have been considering justifications only for extraordinary majority requirements with respect to bonded indebtedness. Also involved in this case is an extraordinary majority provision relating to increases in the tax rate. We have been unable to find any suggestion as to why this issue is of such unusual importance as even colorably to justify the requirement of an extraordinary majority. There appears to be no reason why a minority of the voters should be able to determine that the tax rate for a local taxing unit shall be X% rather than Y%.

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[24] See also *Turner* v. *Fouche*, 396 U.S. 346, 364 (1970); *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 670 (1966); *cf. Baldwin* v. *Seelig*, 294 U.S. 511, 521-22 (1934); *Mullane* v. *Central Hanover Trust Company*, 339 U.S. 306 (1950).

[25] *Turner* v. *Fouche*, 396 U.S. 346, 364 (1970).

II.

THE PRINCIPLES ENUNCIATED IN RECENT CASES PROTECTING THE RIGHT TO VOTE FROM IMPAIRMENT OR DILUTION EXTEND TO THE CASE AT BAR.

In a long series of recent cases, this Court has shown a special solicitude for that basic instrument of democracy—the vote. In the reapportionment cases,[26] the so-called fenced-out cases[27] and in a variety of other contexts,[28] this Court has steadfastly guarded the purity of the electoral process.[29] In so doing, it has deepened and enriched the quality of our democracy. "The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement."[30]

We must recognize at the outset that none of these decisions is dispositive of or directly controlling in the case at bar. The question for this Court is whether the

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[26] *Baker* v. *Carr*, 369 U.S. 186 (1962); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Gray* v. *Sanders*, 376 U.S. 1 (1963); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *WMCA* v. *Lomenzo*, 377 U.S. 633 (1964); *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964); *Davis* v. *Mann*, 377 U.S. 678 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964); *Lucas* v. *Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713 (1964); *Avery* v. *Midland County*, 390 U.S. 474 (1968); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Wells* v. *Rockefeller*, 394 U.S. 542 (1969); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970).

[27] *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Kramer* v. *Union Free School District*, 393 U.S. 621 (1969); *Cipriano* v. *City of Houma*, 393 U.S. 701 (1969); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970).

[28] *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

[29] "We deal here with matters close to the core of our constitutional system [,] 'the right . . . to choose,' *United States* v. *Classic*, 313 U.S. 299 (1940), that this Court has been so zealous to protect." *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965).

[30] *Hadley* v. *Junior College District*, 397 U.S. 50, 54 (1970).

radiating principles which these cases contain extend to this case.

Perhaps the most effective way to answer this question is to dwell not on the positive principles enunciated in these cases—one man, one vote; the unconstitutionality of vote dilution or impairment; the heavy burden required to sustain voter exclusion; in short, the prohibition against extraneous weights on the electoral scales—but rather to focus on the distinctions between these cases and the case at bar. By concentrating on the distinctions, we can more easily direct our attention to the critical question of whether these distinctions should make a difference in the application to the case at bar of the general principles enunciated in the voting cases.

A. The Voting Cases Apply Despite the Fact That the Case at Bar Involves the "Election" of an Issue Rather Than a Man To Hold Office.

The obvious distinction between the case at bar and most of the cases we have cited is that, while the case at bar involves the "election" or passage of an issue, most of the cited cases involve the election of a man to hold office. The particular issues presented to the electorate in this case were the issuance of local bonds and an increase in the tax rate. However, the possibilities of issues which may be presented to the electorate are endless. For example, in another extraordinary majority case, the issue was whether a liquor store could be located in a particular area.[31] The first ques-

[31] *Rimarcik* v. *Johansen*, 310 F. Supp. 61 (D. Minn. 1970). In the *Rimarcik* case a three-judge federal court invalidated a Minnesota statute requiring a 55% favorable vote for an amendment of a city charter affecting established "liquor patrol limits" (areas in which the city has authority to grant on-sale and off-sale liquor licenses).

tion therefore is, does it make a difference in the applicability of the precedent we have cited that the question was whether a particular man was to be elected to office rather than whether a particular issue is to be approved? We think not.

There is no obvious reason why the rules against dilution of the vote should be inapplicable where the question is whether an issue should be passed, as opposed to whether a man should be elected to a particular office. Surely Negroes or non-freeholders could not be excluded from an election on issues.[32] Neither, we believe, could the rural vote be weighted more than the urban vote. *Gray* v. *Sanders,* 372 U.S. 368 (1968). Why then should this Court permit the dilution and impairment of "yes" votes? Indeed, this Court has already upheld the applicability of the Equal Protection Clause to municipal bond elections. *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970). In each of these cases, the Court struck down state laws denying the franchise to non-freeholders in bond elections.

B. The Voting Cases Rejected the Contention That Weighted Voting May Be Sustained if the Weighting Reflects a Reasonable Representation of Interests.

Next, we consider the argument that extraordinary majority provisions provide a reasonable representation of interests, and that this distinguishes the case at bar from the reapportionment cases where the question was the fair representation of people.

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[32] Cases relating to exclusion of Negroes: *Nixon* v. *Herndon,* 273 U.S. 536 (1927); *Nixon* v. *Condon,* 286 U.S. 73 (1932); *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Terry* v. *Adams,* 345 U.S. 461 (1953). Cases relating to exclusion of non-freeholders: *Kramer* v. *Union Free School District,* 393 U.S. 621 (1969); *Cipriano* v. *City of Houma,* 393 U.S. 701 (1969); *Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970).

In our view, the reapportionment cases and *Gray* v. *Sanders,* 372 U.S. 368 (1963), reject the principle that representation of varying interests may justify weighted voting. At bottom, whoever is elected matters only because of the positions he will take on *issues;* the critical interest of the electorate in an officeholder lies in how he will vote on issues. The reapportionment cases, and *Gray* v. *Sanders,* 372 U.S. 368 (1963), reject the notion that an election may be fair and constitutional simply because *interests* are reasonably represented. Instead, this Court ruled that each man's vote was to count equally with every other vote, despite the fact that other schemes, such as Georgia's county unit system which was struck down in *Gray* v. *Sanders,* could produce a reasonable representation of interests. As the Court stated in *Reynolds* v. *Sims,* 377 U.S. 533, 579-580 (1964), "Neither history alone, *nor economic or other sorts of group interests,* are permissible factors in attempting to justify" vote dilution (emphasis supplied) See also *Davis* v. *Mann,* 377 U.S. 678, 692 (1964); *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 533 (1969).

Let us suppose a hypothetical case in which a board of commissioners is specially elected to decide whether bonds should be issued or tax rates raised within its jurisdiction. Suppose further that knowing that the sparsely populated rural areas of the jurisdiction are more conservative in these matters, the legislature decided to give reasonable representation to this rural interest by granting two votes to each rural voter in the election of the commissioners. Surely this scheme is unconstitutional. A scheme in which the dilution of a man's vote is direct and depends on which way he votes on a particular issue, can be no less unconstitutional than a scheme which indirectly dilutes his vote

by giving it less weight when it is cast for a man who in turn votes on the same issue.

C. The Voting Cases Cannot Be Distinguished on the Ground That a Fairly Representative Government Has Decided That Extraordinary Majorities Will Be Required.

It is also argued that extraordinary majority provisions should be upheld because they are simply a reasonable way in which a representative government (namely a properly apportioned state legislature) has decided by what procedure the local jurisdiction will determine whether it will take certain action, i.e. by an extraordinary majority vote of the people. The method of deciding these questions, it is argued, can always be changed by the fairly elected representatives of the people or, in the case of a state constitutional provision, by amendment thereto.

This argument is answered by the cases which have held that the one man, one vote principle is applicable to malapportioned local government units, notwithstanding the fact that the local malapportionment had been decreed by a properly apportioned legislature with power to change the local malapportionment any time it wished. There, too, it was argued that since a fairly representative legislature had adopted a plan for the election of local officials which provided for the reasonable representation of varying interests, and since the people or the legislature were free to change this method of election, the plan was constitutionally valid. This argument was resoundingly rejected in *Avery* v. *Midland County*, 390 U.S. 474, 480-1 (1967).

> When the state delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that

> those qualified to vote have the right to an equally effective voice in the election process . . . That the state legislature may itself be properly apportioned does not exempt subdivisions from the Fourteenth Amendment.

Also in *Avery* (at 390 U.S. 474, 481) this Court characterized its decision in *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964) as follows:

> Inequitable apportionment of local governing bodies offends the Constitution even if adopted by a properly apportioned legislature representing the majority of the State's citizens. The majority of a State—by constitutional provision, by referendum, or through accurately apportioned representatives—can no more place a minority in oversize districts without depriving that minority of equal protection of the laws than they can deprive the minority of the ballot altogether, or impose upon them a tax rate in excess of that to be paid by equally situated members of the majority. Government—National, State, and local—must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of lawmakers, no matter how large the majority wishing to deprive other citizens of equal treatment or how small the minority who object to their mistreatment. *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964), stands as a square adjudication by this Court of these principles.

It is said that since the legislature can decide whether a bond issue is to be authorized, it can decide to reach that decision in any way it chooses, including the use of an extraordinary majority election. But it cannot be true that the legislature is wholly and completely free to determine how that decision will be reached. For example, the legislature cannot decide to reach

that decision by an election which excludes Negroes or non-freeholders;[33] nor can it do so by an unfairly weighted electoral process.[34] Moreover, the Court has held that the one man, one vote principle of the reapportionment cases apply to elections of college trustees whose offices could have been filled by appointment rather than by election, even though the Court had previously "held that where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws."[35] Thus, "whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election . . ."[36]

This Court has specifically ruled that legislatures may not distribute their legislative power free of the constraints of the Fourteenth Amendment. Even the power of the people themselves is limited by these constitutional restraints:

> . . . [T]hat a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which other-

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[33] See cases cited in footnote 32, *supra*.

[34] *Gray* v. *Sanders*, 372 U.S. 368 (1963).

[35] *Hadley* v. *Junior College District*, 397 U.S. 50, 58 (1970), citing *Sailors* v. *Board of Education*, 387 U.S. 105 (1967).

[36] *Hadley* v. *Junior College District*, 397 U.S. 50, 56 (1970). See also *Avery* v. *Midland County*, 390 U.S. 474 (1968).

> wise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736-737 (1964). The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.[37]

In short, once it is determined to decide a question by an election, that election must comport with the requirements of the Fourteenth Amendment and each voter must be given an equal opportunity to influence the decision. This requirement is not met if a voter's negative vote is weighted more heavily than another voter's affirmative vote. As this Court stated in *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 655 (1966), "Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

In addition, there are special reasons why an extraordinary majority provision offends the electoral process. It incorporates a principle of inaction, of preservation of the status quo, of resistance to change. The requirement itself depletes the energies of those progressive elements who seek to meet the changing needs of the future; the effort to produce change is not made because success is so difficult; even a majority cannot produce change.[38] Thus the legislature which enacts an extraordinary majority requirement for a local

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[37] *Hunter* v. *Erickson*, 393 U.S. 385, 392 (1969).

[38] It is interestiing to note that this Court's decisions striking down provisions of statutes excluding non-freeholders from voting in bond elections (*Cipriano* v. *City of Houma*, 393 U.S. 701 (1969); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970)) have made it more difficult to pass bond issues. The previously excluded voters are,

government says to the people of that local governmental unit that the majority no longer rule. In the final analysis, an extraordinary majority provision incorporates the provision of minority rule.

D. Extraordinary Majority Provisions Cannot Be Sustained by Analogy to Similar Provisions With Respect to Action by Federal and State Legislatures.

The final argument by which extraordinary majority provisions are sought to be justified is that they are sanctioned by analogy to extraordinary majority provisions in state and federal legislatures.

This argument is easily met. The so-called federal analogy has already been rejected in *Gray* v. *Sanders*, 370 U.S. 368, 378 (1963). Moreover, provisions for extraordinary majorities in the case of legislative action relate, so far as we are aware, primarily, if not exclusively, to matters in which the legislature acts in a judicial or quasi-judicial capacity (such as impeachment proceedings), to matters in which the legislature approves action taken by another branch of government (such as the approval of a treaty), to matters relating to the balance of power between different branches of government (as in the extraordinary majority requirement to override an executive veto), or to internal operations of a legislative body (such as a two-thirds vote to dislodge bills from committee). That these questions involve different considerations is ob-

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as a group, more transient than freeholders and are therefore less likely to be in favor of the increased taxes required to service bonded indebtedness. We note this unhappy result despite the fact that we applaud the doctrinal soundness of these decisions. On the other hand, it would be unfortunate indeed if the Equal Protection clause were interpreted to forbid the exclusion of a group who tend to be "no" voters and yet permit the dilution of "yes" votes.

vious and quite apart from the fact that none of them involves an election by the people as does the instant case.

Moreover, it may be that certain issues crucial to the stability of government and generally relating to its organic structure [39] may be subject to change only upon the approval of more than 50 percent of the voters. However, the Court need not decide that question in this case, for certainly the question as to whether bonds should be issued or tax rates should be raised is not such an issue. As we have shown, there is nothing unusual about these issues, nor anything which differentiates them in any significant way from a multitude of other issues decided by local governments. In the absence of a demonstration of a compelling governmental interest in the extraordinary majority requirement, this requirement must fall.

E. The Cases on Which Petitioners Rely Are Inapposite.

It remains only to discuss the cases on which those who defend the constitutionality of extraordinary majority provisions rely.

Perhaps the principal case on which reliance is placed is *Fortson* v. *Morris,* 385 U.S. 231 (1966). In that case the Court sustained, 5-3, a Georgia law which provided that in the event no candidate for governor received a majority of votes, the Georgia legislature would choose the governor from the two candidates who received the highest number. The holding of the case is simply that the Constitution permits a state to select a governor by majority vote of the legislature when no candidate in the popular election receives a

[39] For example, a change from a bicameral to a unicameral legislature.

majority. Of course, in the election by the legislature only a majority, not an *extraordinary* majority, is needed to elect. Indeed, the *Fortson* case is not even a voting case. It is limited to the question of whether a state may choose its governor other than by election of the people. It is, we submit, impossible to find imbedded in this case a principle which can be said to apply to the case at bar. The best that can be argued for this case in support of petitioners' position is that if a plurality winner may be constitutionally rejected, an extraordinary majority may be constitutionally required. But this would be clearly misleading reasoning. To reject a decision of a plurality, but less than a majority, of the voters is one thing; to reject the decision of a majority as is often done by extraordinary majority provisions is quite another. Thus even giving the *Fortson* case its broadest reading, it does not extend to the case at bar.

The second case which is cited in support of extraordinary majority provisions is *Dusch* v. *Davis,* 387 U.S. 112 (1967), in which the Court sustained the constitutionality of a Virginia law requiring 7 of 11 city councilmen who were elected at large to nevertheless be residents of 7 different boroughs in the city, so that there would be at least one councilman from each borough. There was no malapportionment question in the case because all of the councilmen were elected by the votes of the entire city. The only question arose because the plan required the election of at least one candidate from each of the boroughs. Rejecting the constitutional attack on this statutory design, the Court stated:

> The present consolidation plan uses boroughs in the city "merely as the basis of residence for candidates, not for voting or representation." [Each

> councilman] is nonetheless the city's, not the borough's, councilman . . . . If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow [387 U.S. at 116].

The Court found that since each councilman's tenure is dependent upon a city-wide electorate, he would be vigilant to serve the interests of all the people in the city, not merely those in his home district. Thus, he would be in fact the city's and not the borough's councilman. Because of the differing characteristics of the boroughs, the Court found that, at least for a transition period, there was a compelling need for one councilman on the council with knowledge of each of the different borough's problems. The limits of this case are plain. It merely permits a state to provide for representation of different interests in its legislature by requiring a geographic dispersal of its legislators. However, it is clear that it does not permit malapportionment or weighted voting to be sustained on a "reasonable representation of interests" theory. *Gray* v. *Sanders,* 372 U.S. 368 (1963).

The final case on which those supporting extraordinary majority provisions rely is *Sailors* v. *Board of Education,* 387 U.S. 104 (1967). That case sustained a Michigan law providing for the appointment of the county school board by delegates from local school boards. The Court stated:

> We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election . . .
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> . . . .

> The Michigan system for selecting members of the county school board is basically appointive rather than elective . . .
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> . . . .
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> Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative officers, the principle of "one man, one vote" has no relevancy [387 U.S. at 108, 109, 111].

Clearly, this case has no application to the case at bar, which *does* involve an election. The limits of the *Sailors* decision were clearly delineated in discussion in *Hadley* v. *Junior College District,* 397 U.S. 50 (1970). The Court recognized in *Hadley* as it had held in *Sailors* that, a state may, if it wishes, appoint rather than elect, but "whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election" (397 U.S. at 56).

By the same token, a legislature may itself decide whether or not to issue local bonds, or it may delegate that decision to a local electorate, but if it is decided that that decision is to be made by the electorate in an election, then that election must comport with the Equal Protection Clause. As applied to such an election, we see no way of avoiding the conclusion that electoral decision must be made by a majority, rather than a minority, of those voting.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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